



COURT FILE NUMBER **2001 05 843**

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANTS JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

DOCUMENT **ORIGINATING APPLICATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Mitchell Cohen, Q.C.
 Jay Cameron

Justice Centre for Constitutional Freedoms
 #253, 7620 Elbow Drive SW
 Calgary, Alberta T2V 1K2
 Phone: 403-475-3622
 Fax: 587-352-3233
 Email: mcohen@jccf.ca
 jcameron@jccf.ca
Counsel for the Applicant

NOTICE TO THE RESPONDENT

This application is made against you. You are a respondent. You have the right to state your side of this matter before the Court. To do so, you must be in Court when the application is heard as shown below:

Date: ~~May 21, 2020, or such time as determined.~~ **TBD**

Time: 10:00 AM

Where: Calgary Courts Centre
 601 5th Street SW Calgary Alberta

Before: Justice in Special Chambers

Go to the end of this document to see what you can do and when you must do it.

REMEDY SOUGHT

1. The Applicant seeks the following relief:

- a. An Order abridging the time for service of this Originating Application and supporting materials, if necessary;
- b. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act* contravene section 92 of the *Constitution Act, 1867* (exclusive power of the provincial legislature to enact laws), and are therefore of no force or effect;
- c. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act* contravene sections 55 and 90 of the *Constitution Act, 1867* (requirement for Royal Assent for enacted laws), and are therefore of no force or effect;
- d. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act* violate the unwritten constitutional principles labelled by the Supreme Court of Canada as the democratic principle and the separation of powers (by providing for the enactment, without legislative oversight of laws, for a period of up to 150 days and potentially indefinitely through renewals by Cabinet of the order declaring a public health emergency, without any participation or input from the citizens of Alberta), and are therefore of no force or effect;
- e. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act* violate the unwritten constitutional principle of the rule of law (by subjecting citizens to unpredictable and potentially arbitrary law-making and executive action for an unspecified period of time), and are therefore of no force or effect;
- f. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act* violate the unwritten constitutional principle of the rule of law (by rendering meaningful judicial review of ministerial decisions impossible due to the lack of legislative parameters constraining executive action), and are therefore of no force or effect;

- g. A Declaration pursuant to Section 52(1) of the *Constitution Act, 1982* that any implicit amendment of the Constitution of Alberta effected by sections 52.1(2)(b) and 52.21(2)(b) of the *Public Health Act* would not comply with the requirements of section 45 of the *Constitution Act, 1982* (power of the provincial legislature to amend the constitution of the province);
- h. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 52.8(1) and 52.811 of the *Public Health Act* violate the unwritten constitutional principle of the rule of law (by permitting Cabinet to reissue fresh declarations of emergency without express renewal by the Legislative Assembly) and that the word “continued” should be understood and be read as “renewed”;
- i. Costs of this Application; and
- j. Such further and other relief as counsel may advise and as this Honourable Court deems just and equitable.

GROUND FOR MAKING THIS APPLICATION

Background

2. On March 17, 2020, the Alberta Government declared a provincial state of public health emergency pursuant to section 52.1(1) of the *Public Health Act* in response to the communicable viral infection referred to as COVID-19. Subsequent steps by the Alberta Government to close the economy have wrought profound economic damage and the severe restriction of civil liberties.
3. On March 31, 2020, *Bill 10: Public Health (Emergency Powers) Amendment Act, 2020* (Bill 10) was introduced in the Legislative Assembly. It came into force two days later on April 2, having passed third reading by a vote of 14 to 7. Including the Speaker, 22 Members of the Legislative Assembly (MLAs) out of a total of 87 MLAs were present for the vote. No public consultation or study of Bill 10 occurred prior to its coming into force. The Bill was protested strenuously by several opposition MLAs, as recorded in the Alberta *Hansard*.
4. As amended by Bill 10, section 52.1(2)(b) of the *Public Health Act* empowers the Minister responsible for an “enactment” or the Minister of Health, in the event of a Cabinet Order declaring a “public health emergency,” to unilaterally and “without consultation” or legislative

oversight “specify or set out provisions which apply in addition to, or instead of, any provision on an enactment.” This power to make new law may be exercised when the Minister in question subjectively and personally determines that the action is required in the “public interest” as determined by that same Minister. The power remains entirely in the hands of a single Minister, without review by the Legislative Assembly, during, and for a period of 60 days following the lapsing of, a “public health emergency”.

5. Similarly, section 52.21(2)(b) of the *Public Health Act*, as amended by Bill 10, authorizes the Cabinet, in the event of a likely influenza pandemic, to make an Order authorizing a Minister overseeing a legislative scheme to “specify or set out provisions which apply in addition to, or instead of, any provision of an enactment for which the Minister is responsible.” This power to make new law may also be exercised when the Minister in question is personally and subjectively “satisfied that failing to do so may directly or indirectly unreasonably hinder or delay action required in order to protect the public health”. This power remains entirely in the hands of a single Minister, without review by the Legislative Assembly, and lapses only when the authorizing Cabinet Order lapses.
6. Section 52.8(1) of the *Public Health Act*, which purports to limit the duration of an order under section 52.1(1) or section 52.21(1), does not prohibit Cabinet from making a fresh declaration of a “public health emergency” or one with a “significant likelihood of pandemic influenza” once the previous public health emergency has ended. This indicates that the creation of such orders could continue indefinitely without legislative authority and oversight at the behest of Cabinet.
7. Likewise, section 52.811 does not limit the duration of orders by Ministers made under section 52.1(2) or section 52.21(2). Cabinet can continue an order for 180 days past the 60 day lapse of the order. Or, if Cabinet continues to declare public health emergencies, then the plenary power vested in Minister also continues, potentially indefinitely.
8. Section 52.1(2)(b) and section 52.21(2)(b), hereafter collectively referred to as the “Amendments,” authorize an unprecedented and unconstitutional transfer of plenary legislative authority from the Legislature of Alberta to the executive branch of government, empowering a single Minister with law-making power.

The Applicant

9. The Justice Centre for Constitutional Freedoms (the “Justice Centre”) is an Alberta-based non-partisan charitable organization that defends the constitutional rights of all Canadians. It accepts no government funding. It represents citizens on a *pro bono* basis whose *Charter* rights and freedoms may have been infringed by government or by a state body exercising statutory authority. The Justice Centre has intervened in or provided counsel in numerous court matters at all levels of court and throughout Canada. Over its 10-year existence, the Justice Centre’s in-house legal team has developed expertise in constitutional law, including constitutional challenges to legislation.
10. The unprecedented and plenary delegation of power from the Legislature to individual Ministers, which was effected by these Amendments, is a matter of urgent public interest and concern, and a breach by the Government of Alberta of electoral trust and the principles of constitutionalism, democracy, and the separation of powers.
11. The Justice Centre meets the test for public interest standing and brings this application on its own behalf as a public interest litigant.

Legal Basis

A. Introduction

12. The Canadian Constitution incorporates both written and unwritten foundational principles. Laws which are inconsistent with the Constitution – with either its explicit textual provisions or the unwritten principles that clarify the meaning of the text – are of no force or effect; this is particularly true when these laws purport to alter the constitutional architecture that defines the spheres of activity and respective boundaries of the powers of each branch of government.
13. The Constitution is not suspended by a pandemic crisis or any other public health emergency. It remains the supreme law of Canada at all times.
14. The Amendments violate the Constitution. They establish ministerial fiat in place of the rule of law. They vitiate the separation of powers and circumvent democratic governance. It falls to the courts, the ultimate guardian of the Constitution, to declare the Amendments of no force and effect.

B. The Institutional Architecture of the Constitution

15. The text of the *Constitution Act, 1867* provides the authority for legislative, executive, and judicial branches of government. There is a clear and unequivocal separation of powers under the Constitution.
16. In elucidating the unwritten constitutional principles embedded by the preamble of the *Constitution Act, 1867*, the Supreme Court of Canada has recognized that it is fundamental to the working of government that the legislative body, the executive and the courts all play their proper role, and that it is equally fundamental that no one of them overstep their bounds and instead show proper deference for the legitimate and constitutionally-defined sphere of activity of the other.
17. Further, the Constitution, and its historical and legal underpinnings, exist as a check to rule by one individual over the lives of the citizenry. History bears witness to the abuses which flow from the arbitrary rule of one over many. The citizens of Alberta have at no time waived or foregone their right to a representative system of democracy in accordance with the Constitution, and the checks and balances of the rule of law.

C. The Amendments Violate the Constitution

18. Sections 91 and 92 of the *Constitution Act, 1867* grant “exclusive” legislative authority to Parliament and the provincial legislatures.
19. Sections 55 and 90 of the *Constitution Act, 1867* provide that Royal Assent is required in order to bring laws into force. Delegation of plenary legislative power to the executive branch circumvents the requirements of sections 55 and 90 and is an unconstitutional demolition of Alberta's fundamental constitutional architecture.
20. Drawing on the democratic principle that citizens must have an opportunity to participate in the formulation of laws, the Supreme Court of Canada has affirmed that the constitutional architecture prevents legislatures from undermining the basis of their own legitimacy. Discussion, debate, and deliberation must occur before laws are made. A society of free citizens depends upon open legislative discourse.
21. The Amendments were enacted by a skeleton legislature in circumstances that provided little meaningful opportunity for debate or public comment. They provide the executive with

virtually unrestricted legislative power, instead of narrowing the field of executive decision-making, as required.

22. Instead of meaningful statutory constraints, the Amendments require only that the relevant Ministers, in sections 52.1(2) and 52.21(2), perceive the “public interest” and protection of “public health” respectively.
23. The untrammelled powers in the Amendments may expressly be exercised “without consultation.”
24. Furthermore, and inexplicably, the enormous decree power established under section 52.1(2) or section 52.21(2) and granted to a single Minister subsists for a full 60 days following the lapsing of any declared public health emergency. Consequently, with the timelines set out in sections 52.8(1) and 52.811 of the *Public Health Act*, section 52.1(2) allows for an extraordinary five-month period of rule by executive decree (90 days for the public health emergency order and the enactment is valid for 60 days past the lapse of that order) where a “public health emergency” has been declared in the circumstances of an influenza pandemic. The corresponding time period established under section 52.21(2) is three months. The opportunity for public and legislative input during these time frames is non-existent. If Cabinet so chooses, per section 52.811(5) of the *Public Health Act*, Cabinet can continue an order made by a Minister under section 52.1(2) or section 52.21(2) for 180 days after the lapse.
25. Sections 52.8(1) and 52.811 are vague and ambiguous. Cabinet is not expressly prohibited from making fresh declarations of a public health emergency without express authority of the Legislative Assembly, thus perpetuating its unconstitutional powers indefinitely without legislative oversight.
26. The Amendments lack any semblance of democratic legitimacy and any vestige of legislative policy guidance. They do not operate within reasonable limits and reveal a legislature that has abdicated its responsibility to govern. They are an unconstitutional violation not only of the democratic principle and the separation of powers but also of the rule of law in that they place citizens at the mercy of uncertain, and potentially arbitrary and abusive law-making by Cabinet ministers.
27. The Amendments do not specify the duration of the laws enacted by Ministers pursuant to their emergency powers. While the ability to make new laws may expire within the 3-month and 5-

month periods outlined above unless the public health emergency declaration is continued by the Cabinet, the effect of the laws enacted during that time may continue until formally altered by the legislature.

28. The judicial review of executive action, which is a bedrock component of the rule of law, is frustrated where governing legislation does not specify any limitations on executive law-making powers. Courts cannot apply statutory constraints against arbitrary state action where no such constraints exist.
29. The Constitution of Alberta is, like many provincial constitutions, unwritten. One of its foundational principles is the vesting of power to make laws in the democratically elected legislature alone. The Amendments bypass this imperative, effectively attempting an unlawful amendment to the Alberta Constitution contrary to section 45 of the *Constitution Act, 1982*.
30. The Supreme Court of Canada has clearly stated that in exceptional circumstances the rule of law, which arises by “necessary implication” from the express terms of the Constitution, can provide a basis on which to overrule legislation.
31. A desire to facilitate swift executive action in the face of an emergency is not a valid justification for violating the principles of the Constitution. The *Public Health Act* unamended already contained broad emergency powers authorizing rapid response to emergencies in section 52.6. There is no legal justification for the untrammelled and ultimately unconstitutional powers that the Amendments grant.
32. The Amendments represent one of the most extensive delegations of legislative power ever attempted in Canada and violate both the text and the architecture of the Constitution. The violations are egregious and raise an issue of urgent public import.
33. The Applicant respectfully requests that this Honourable Court strike down the Amendments as unconstitutional and declare them of no force and effect.

MATERIALS TO BE RELIED ON

34. The Affidavit of John Carpay; and
35. Such further and other material as counsel may advise and as this Honourable Court may allow.

APPLICABLE ACTS AND RULES

36. *Alberta Rules of Court*, Alta Reg 124/2010;
37. *Constitution Act, 1867*, 30 & 31 Vict, c 3
38. *Canada Act 1982 (UK)*, 1982, c 11, including the *Canadian Charter of Rights and Freedoms*;
39. *Constitution of Alberta Amendment Act*, 1990, RSA 2000, c C-24
40. *Alberta Bill of Rights*, RSA 2000, c A-14;
41. *Public Health Act*, RSA 2000, c P-37
42. *Bill 10: Public Health (Emergency Powers) Amendment Act, 2020*.
43. Such other enactments as the Applicant may advise.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).